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VIA ECFS
Marlene Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Ex Parte* Presentation: CC Docket No. 01-92, WC Docket No. 10-90, WC Docket No. 07-135, WC Docket No. 05-337, GN Docket No. 09-51, and WC Docket No. 06-122

Dear Ms. Dortch:

As the Federal Communications Commission (the "Commission") readies itself to finalize rules in this docket, Northern Valley Communications, L.L.C. ("Northern Valley"), by counsel, would like to make a few final observations regarding the Commission's proposed rules relating to services to high volume end users, such as free conference calling services. In particular, Northern Valley provides these further comments relating to the suggestion by some IXCs that the Commission should conclude that 47 U.S.C. § 203(c) and 47 U.S.C. § 254(k), collectively or independently, prohibit revenue sharing arrangements between LECs and their high volume customers[1] and, in particular, whether these sections of the Act should be found to prohibit revenue sharing arrangements by competitive local exchange carriers ("CLECs"), such as Northern Valley.

I. SECTION 203(C)

Section 203(c) of the Act provides that no carrier shall "refund or remit payment by any means or any device any of the charges" collected pursuant to a tariff. 47 U.S.C. § 203. The suggestion that Section 203(c) somehow prohibits revenue sharing agreements between a LEC and its end user customers defies the unambiguous meaning of the Act and must be rejected. First, the relationship between a LEC and its end user customer is *not* governed by a LEC's interstate access tariff. For Northern Valley, for example, South Dakota law governs its duties and responsibilities with regard to the provision of service to its local end-user customers, and

[1] *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up*, 26 F.C.C.R. 4554, ¶ 676-77 (2011).

Northern Valley is expressly permitted to provide "whatever discount, incentive, or service" it deems necessary to compete for its conference-calling customers' business. SDCL § 49-31-84.[2]

Moreover, Section 203(c) does not prohibit the sharing of access revenue with end users because IXCs, not end users, pay the tariffed access charges contained in a LEC's interstate access tariff. Thus, there is no "rebate" under any legitimate understanding of that word. In *Panatronic USA v. AT&T Corp.*, 287 F.3d 840 (9th Cir. 2002), the Ninth Circuit held that "[w]e construe § 203(c) as conferring a cause of action on *customers* covered by the tariff at issue. . . ." *Id.* at 845 (emphasis added). Accordingly, because the plaintiffs in *Panatronic* were not customers covered by the tariff at issue, the Ninth Circuit concluded that the plaintiff "lacks standing to invoke the independent protection of this section." *Id.* (citation omitted); *see also id.* ("We construe § 203(c) as conferring a cause of action on customers covered by the tariff at issue, but not on customers covered by other tariffs. Because [claimant] was not a customer covered by the VTNS tariff, it suffered no injury under section 203(c) by AT&T's delay in imposing the UCC fee on its VTNS customers. Therefore, [claimant] lacks standing to invoke the independent protection of this section.") (citation omitted). Thus, under the plain meaning of section 203(c), it is impossible for a LEC to give a refund to their end users when those end users do not pay tariffed interstate access charges.

II. SECTION 254(K)

The prohibition against cross-subsidization embodied in 47 U.S.C. § 254(k) was intended to address the situation where an incumbent local exchange carrier ("ILEC") has shared facilities and equipment that are used in both the provision of long-distance service (which is subject to competition) and local exchange service (which became subject to competition for the first time following the enactment of the 1996 amendments to Communications Act of 1934). The former monopolist ILECs, however, were still rate-of-return regulated in their provision of local exchange services. They, thus, had the incentive to allocate as much of their costs to the rate-of-return side of their operations as it would guarantee them higher rates and profits. To prevent ILECs from doing this, however, Congress enacted Section 254(k), which the Commission in turn implemented by requiring ***ILECs*** to adhere to rigorous accounting and reporting procedures in order to comply with Section 254(k)'s mandate.[3]

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2 The Commission has repeatedly stated that it does not regulate the relationship between a LEC and its end user, stating that it would "abstain entirely from regulating the market in which end-user customers purchase access service" from CLECs. *In re Access Charge Reform*, CC Docket No. 96-262, 16 FCC Rcd. 9923, 9930, ¶ 39 (2001).

3 *See* 47 C.F.R. §§ 64.901-64.905.

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The Commission has rightfully forborne from applying 47 U.S.C. 254(k) to CLECs and no basis exists to change this policy. In implementing Section 254(k), "the Commission established a distinction between carriers with market power and those without."[4] When speaking of the provision in 47 U.S.C. 254(k) that "a telecommunications company may not use services that are not competitive to subsidize services that are subject to competition," the Commission has consistently held that this "provision of section 254(k) addresses the concern that ***ILECs*** may attempt to gain an unfair market advantage in competitive markets by allocating to their less competitive services, for which subscribers have no available alternative, an excessive portion of the costs incurred by their competitive operations."[5] Moreover, the Commission has expressly declined in the past to specify what, if any, conduct on a CLEC's part could constitute a violation of section 254(k), stating that to do so would be "*to provide what would be merely an advisory opinion* on the lawfulness of [a CLEC's] conduct under section 254(k)."[6] Indeed, the Commission could have chosen to do so in the *Seventh Report and Order*[7] or *Eighth Report and Order*[8] devoted to CLEC access charges, yet section 254(k) is not even mentioned in those orders.[9] In sum, Section 254 (k) does not now, and should not in the future, have any application to a CLEC's provision of service.

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4 *In re Implementation of Section 254(k) of the Communications Act of 1934, as Amended*, 12 FCC Rcd. 6415, 6416 ¶ 2 (1997) ("*254(k) Order*").

5 *254(k) Order* ¶ 7 (emphasis added).

6 *AT&T Corp. v. Bus. Telecom, Inc.*, 16 FCC Rcd. 12312, 12339-40 (2001) (emphasis added) (Commission also expressly denied the complaining carrier's claim under Section 254(k).).

7 *In Re Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order, FCC 01-146, 16 F.C.C.R. 9923 (2001) ("*Seventh Report and Order*").

8 *In re Access Charge Reform,* CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, FCC 04-110, 19 FCC Rcd. 9108 (2004) ("*Eighth Report and Order*").

9 Indeed, in the *Seventh Report and Order*, the Commission expressly found that, due to the increased cost of providing access in rural areas and the rural CLECs' inability to average their costs among rural and non-rural areas, rural CLECs were entitled to charge higher access rates, notwithstanding the IXCs' claim that this right would lead to improper subsidies from the IXCs. *See* 16 FCC Rcd. 9923 ¶ 67 ("In adopting the rural exemption, we reject the characterization of the exemption as an implicit subsidy of rural CLEC operations. . . . Instead, it merely deprives the IXCs of the implicit subsidy for access to certain rural customers that has arisen from the fact that non-rural ILECs average their access rates across their state-wide study areas."). Thus, the Commission was cognizant of the issue of subsidies in this context, and specifically rejected the notion that its rural access charges were themselves subsidies. Commission should decline to upset this long-standing agency policy.

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Some in the industry – particularly certain interexchange carriers ("IXCs") – have attempted vigorously to change this policy, especially as it relates to revenue-sharing opportunities for CLECs. Specifically, these IXCs have urged the Commission in its latest notice of proposed rulemaking ("NPRM") to apply the Commission's regulations preventing cross-subsidization under Section 254(k) to such revenue sharing arrangements.[10] Such application of Section 254(k), however, would be inappropriate for at least two reasons.

First, CLECs do not have monopoly control over the provision of local telephone service. While it is true that the Commission has found that CLECs have "monopoly control" in the limited sense that they own the path to their own end users, it is no less true that these end users are free to choose another LEC to provide their local service on a moment's notice. It is also becoming abundantly clear that the provision of local service is less and less a LEC-only market as voice over Internet Protocol ("VoIP"), commercial mobile radio service ("CMRS"), and broadband-based voice services are taking larger and larger shares of the local market.

Second, Section 254(k), by its own terms, simply does not apply to these types of business arrangements. Section 254(k), instead, relates to a carrier's use of revenue from a monopoly service to subsidize *its own* competitive telecommunications services. By contrast, when a CLEC enters into a revenue sharing arrangement with a conferencing provider, the alleged "competitive" services are those of the conferencing provider, not those of the CLEC. This fact is further substantiated by ample Commission precedent permitting access revenue sharing between a carrier and other entities, even when the sharing resulted in a net payment from the LEC to its end user customer.[11]

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10 *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up*, 26 F.C.C.R. 4554, ¶ 676 (2011).

11 In *AT&T Corp. v. Jefferson Telephone Co.*, 16 FCC Rcd. 16130 (2001), the Commission reviewed a challenge by AT&T regarding the lawfulness of access charges assessed on AT&T traffic terminating to chat line providers in Jefferson's service area. *Id.* ¶ 2. The Commission concluded that the revenue-sharing agreement between Jefferson and IAN -- "one of Jefferson's end-user customers" -- did not violate the Act. *See also AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd. 4041 (2002); *AT&T Corp. v. Beehive Telephone Co.*, 17 FCC Rcd. 11641 (2002); *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd. 9108, ¶¶ 70-71 (it is not inappropriate for CLECs to share access revenue with "customers generating a high volume of 8YY traffic").

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The Commission should thus continue to refrain from adopting regulations under Section 254(k) that would apply to a CLEC – whether generally or in the context of revenue sharing arrangements. To do otherwise, would be both in direct contradiction of the Commission's past policy and contrary to the plain language of Section 254(k).

For the foregoing reasons, Northern Valley respectfully urges the Commission to not harm competition by concluding that revenue sharing arrangements between LECs and high volume customers violates either Section 203(c) or Section 254(k).

Respectfully submitted,

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